

No. 05-578 OCT 31 2005

In the
Supreme Court of the United States

LOUIS F. GILLIGAN AND GREGORY M. UTTER,
Petitioners,

v.

MEDTRONIC, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Public Disclosure Bar of the False Claims Act, 31 U.S.C. §3730(e)(4)(A), bars *qui tam* law suits where the relator's claims are found to be "based upon the public disclosure of allegations or transactions" in certain public proceedings. The interpretation of that phrase has lead to confusion and inconsistency in the courts of appeals. The questions presented here are:

1. Whether this Court should resolve the current circuit split on the question of whether a *qui tam* lawsuit is "based upon" prior public disclosures and find that the Sixth Circuit erred in holding that such a *qui tam* lawsuit must merely be "supported by" and not derived from those prior public disclosures?
2. Whether this Court should resolve the confusion in the courts of appeals regarding when an "allegation" of fraud has been sufficiently made in a public disclosure such that the allegation can be said to form the basis of a later *qui tam* lawsuit, thereby barring the suit?
3. Whether this Court should resolve the confusion in the courts of appeals regarding when a "fraudulent transaction" has been publicly disclosed such that it can be said to form the basis of a later *qui tam* lawsuit, thereby barring the suit?

PARTIES TO THE PROCEEDING

Petitioners Louis F. Gilligan and Gregory M. Utter were the Relators-Appellees below and filed this *qui tam* action in the name of and on behalf of the United States. Respondent Medtronic, Inc. was the Defendant-Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Louis F. Gilligan and Gregory M. Utter respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 403 F.3d 386, and is reproduced in the Appendix at 3a. The Sixth Circuit's decision denying Petitioners' petition for panel rehearing and suggestion for rehearing *en banc* is unreported and is reproduced in the Appendix at 1a. The district court decision denying Respondent's motion to dismiss is unreported and is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the court of appeals reversing the district court was entered on April 6, 2005. The judgment of the court of appeals denying Petitioners' petition for panel rehearing and suggestion for rehearing *en banc* was entered on August 2, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 3730 provides in part:

Civil actions for false claims

(e) Certain actions barred

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

INTRODUCTION

This case concerns the "Public Disclosure Bar" of the False Claims Act ("FCA"). Prior to 1986, the jurisdictional bar provision of the FCA, 31 U.S.C. § 3729, *et seq.*, barred *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded). In 1986, Congress amended the FCA and enacted the present Public Disclosure Bar, which jurisdictionally bars *qui tam* actions that are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). The subjectivity inherent in the terms "based upon," "allegation," and

"transaction" has caused much confusion and inconsistency in the federal courts of appeal. Indeed, as one court has stated:

Predictably, these jurisdictional provisions . . . have led to extensive litigation and to circuit splits concerning the meaning of the words "based upon," "public disclosure," [and] "allegations or transactions" Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.

United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 681 (D.C. Cir. 1997); *see also United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997) ("The current version of the Public Disclosure Bar has generated a host of interpretive issues").

This Court has not addressed the Public Disclosure Bar. This case presents an ideal opportunity for the Court to clear up that "confusion and inconsistency" because it requires the Court to resolve the acknowledged circuit split on one issue and clarify circuit court confusion on the other issues.

STATEMENT OF THE CASE

A. Factual Background and Proceedings Below

This case involves Medtronic, Inc.'s fraud on the United States Medicare System. Medicare only pays for medical expenses associated with the implantation of pacemakers and pacemaker leads that are approved by the Food and Drug